

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

**DARREN GILBERT,**

**Plaintiff**

**v.**

**DOCTOR'S CHOICE MODESTO LLC, et  
al.,**

**Defendants**

**CASE NO. 1:21-CV-0690 AWI BAM**

**ORDER ON DEFENDANTS' RULE  
12(b)(5) MOTIONS TO DISMISS and  
ORDER TO SHOW CAUSE**

(Doc. Nos. 106, 107, 108)

This is a disabilities discrimination lawsuit brought by Plaintiff Darren Gilbert ("Gilbert") against *inter alia* Defendants Amar Kumar ("Kumar"), Shaibi Abdulqawi d/b/a J's Smoke Shop #9 ("Abdulqawi"), and Arif Faisal d/b/a Global Smoke Shop ("Faisal") (collectively "Defendants"). Defendants are pro se. The active complaint is the Third Amended Complaint ("TAC"), which alleges violations of the Americans with Disabilities Act (42 U.S.C. § 1200 et. seq.) ("ADA"), the California Unruh Act (Cal. Civ. Code § 51), and California Health & Safety Code § 19955. Currently before the Court are Defendants' three separate Rule 12(b)(5) motions. For the reasons that follow, the Rule 12(b)(5) motions will be denied, but Gilbert will be required to show cause why the Court should not decline to exercise supplemental jurisdiction over his Unruh Act and Health & Safety Act claims.

**RELEVANT PROCEDURAL HISTORY**

After obtaining Court permission, see Doc. No. 97,<sup>1</sup> Gilbert filed the TAC on November 10, 2022. See Doc. No. 98.

On November 15, 2022, a summons was issued for Defendant Nindi 2039 LLC. See Doc. No. 99.

On November 18, 2022, a “Certificate/Proof of Service” was filed by Gilbert. See Doc. No. 100. The “Certificate/Proof of Service” indicates that Kumar was served by mail with the TAC. See id.

On November 30, 2022, Kumar filed an answer. See Doc. No. 101. As part of the answer, Kumar pled, “Plaintiff failed to serve service of process.” Id.

On December 5, 2022, Faisal and Abdulqawi filed an “Addendum.” See Doc. No. 103. The “Addendum” is the last page of Kumar’s answer and bears the signature of Kumar, Faisal, and Abdulqawi. See id. The lines immediately before the signatures read, “If more than one Defendant is included in this Answer, each must sign and date below.” Id. The Court takes the Addendum to be an attempt by Faisal and Abdulqawi to join Kumar’s answer in full.

On December 16, 2022, a “Return of Summons Executed” as to Faisal was filed by Gilbert. See Doc. No. 104.

On December 19, 2022, a “Return of Summons Executed” as to Abdulqawi was filed by Gilbert. See Doc. No. 105.

**LEGAL FRAMEWORK**

A Rule 12(b)(5) motion challenges the validity of the actual method or manner of service of process. See Chilicky v. Schweiker, 796 F.2d 1131, 1136 (9th Cir. 1986).<sup>2</sup> Objections to the validity of service of process must be specific and must point out in what manner the plaintiff has failed to satisfy the requirements for proper service. See O’Brien v. R.J. O’Brien & Assocs., 998

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<sup>1</sup> A reference to “Doc. No.” is a reference to a document on the Court’s electronic docket.

<sup>2</sup>Reversed on other grounds, 487 U.S. 412 (1988).

1 F.2d 1394, 1400 (7th Cir. 1993); Photolab Corp. v. Simplex Specialty Co., 806 F.2d 807, 810 (8th  
 2 Cir. 1986). Once service of process is properly challenged, the plaintiff bears the ultimate burden  
 3 of showing that service was valid under Rule 4. See Brockmeyer v. May, 383 F.3d 783, 801 (9th  
 4 Cir. 2004); Xie v. Sklover & Co., LLC, 260 F.Supp.3d 30, 38 (D. D.C. 2017); Koulkina v. City of  
 5 N.Y., 559 F.Supp.2d 300, 312 (S.D. N.Y. 2008). Where a court determines that service of process  
 6 was defective, the court has broad discretion to either dismiss the suit or quash the defective  
 7 service and permit re-service. See S.J. v Issaquah Sch. Dist. No. 411, 470 F.3d 1288, 1293 (9th  
 8 Cir. 2006); Umbenhauer v. Woog, 969 F.2d 25, 30-31 (3d Cir. 1992).

## 9 10 **DEFENDANTS' MOTIONS**

### 11 *Defendants' Arguments*

12 Faisal's motion recounts various aspects of the procedural history of the case, cites to  
 13 Federal Rule of Civil Procedure 4 and California Code of Civil Procedure § 412.20, and then  
 14 states that "Plaintiff did not properly serve Defendant because plaintiff failed to deliver a copy of  
 15 the summons and the [TAC] to Defendants as required by California and Federal Law." Doc. No.  
 16 106.

17 Abdulqawi's motion recounts various aspects of the procedural history of the case, cites to  
 18 Fed. R. Civ. P. 4 and Cal. Code Civ. P. § 412.20, and then states that: "Plaintiff had a copy of the  
 19 Return of Service form, which the clerk provided with the summons of Defendant. (Docket #59).  
 20 However, there is no evidence that this Return of Service was completed by anyone or filed with  
 21 the Court. Plaintiff's service of process was not sufficient under both California and federal law."  
 22 Doc. No. 108.

23 Kumar's motion recounts various aspects of the procedural history of the case and cites to  
 24 Federal Rule of Civil Procedure 4 and California Code of Civil Procedure § 412.20. See Doc. No.  
 25 107. After referencing the November 18 Certification/Service of Process, Kumar states:  
 26 "Defendant did not receive these documents via U.S. Mail and was not personally served." Id.  
 27 Kumar further argues: "Plaintiff did not properly serve Defendant because Plaintiff failed to  
 28 deliver a copy of the Summons and the Third Amended Complaint to Defendant as required by

1 California and Federal Law. The only method of service attempted by Plaintiff was service by  
2 mail . . . . Besides this proof of service by mail, Defendant is unaware that Plaintiff made any  
3 other attempts to serve Defendant with the requisite documents. . . . Because Plaintiff only served  
4 Defendant via mail, service of process was not sufficient under both California law and federal  
5 law.” Id.

6 *Plaintiff’s Opposition*

7 With respect to Faisal, Gilbert argues that Faisal was properly served with process through  
8 Fed. R. Civ. P. 4(e)(1) and Cal. Code of Civ. P. § 415.20(b) when process was left at his place of  
9 business (the Global Smoke Shop) with someone who was apparently in charge. Faisal  
10 acknowledges receipt of the documents left at the business, but does not explain how service was  
11 improper. Moreover, Faisal made a general appearance in this case on December 5, 2022 by  
12 signing the Addendum to Kumar’s answer. The general appearance waived the defense of  
13 improper service.

14 With respect to Kumar, she was properly served with prior complaints. The TAC was  
15 mailed to her, which was proper under Federal Rule of Civil Procedure P. 5(b)(2)(C). Further,  
16 Kumar has filed many responsive pleadings in this case and thus, has waived her ability to  
17 challenge service of process.

18 With respect to Abdulqawi, he was served with process when process was left with his  
19 wife at his home. This was proper under Federal Rule Civil Procedure 4(e)(2)(B). Abdulqawi  
20 does not explain how service of process was improper, nor does he contend that he did not  
21 actually receive the TAC. Moreover, Abdulqawi made a general appearance in this case on  
22 December 5, 2022 by signing the Addendum to Kumar’s answer. The general appearance waived  
23 the defense of improper service.

24 *Discussion*

25 1. Abdulqawi

26 Here, neither dismissing the TAC nor quashing service is appropriate. First, Abdulqawi’s  
27 motion is unclear and does not specifically point out a material defect that would warrant quashing  
28 service. See O’Brien, 998 F.2d at 1400; Photolab, 806 F.2d at 810. Therefore, Abdulqawi has

1 not adequately challenged the sufficiency of service of process. See Koulkina, 559 F.Supp.2d at  
2 312.

3 Second, the “summons returned executed” document demonstrates appropriate service  
4 under Federal Rule of Civil Procedure 4(e)(2)(B). See Doc. No. 105. Rule 4(e)(2)(B) provides:  
5 “an individual . . . may be served in a judicial district of the United States by . . . leaving a copy of  
6 each at the individual’s dwelling or usual place of abode with someone of suitable age and  
7 discretion who resides there.” Fed. R. Civ. P. 4(e)(2)(B); Craigslist, Inc. v. Hubert, 278 F.R.D.  
8 510, 515 (N.D. Cal. 2011); see also Stars’ Desert Inn Hotel & Country Club, Inc. v. Hwang, 105  
9 F.3d 521, 524 (9th Cir. 1997). The return of summons shows that process was left at Abdulqawi’s  
10 home with an adult who appears to be Abdulqawi’s wife. See id. Since there is no indication that  
11 Abdulqawi did not live at the address or that his wife is not of a “suitable age and discretion,” this  
12 information is sufficient to meet the requirements of Rule 4(e)(2)(B).

13 For these reasons, Abdulqawi’s Rule 12(b)(5) motion will be denied.

14 2. Faisal

15 Neither dismissing the TAC nor quashing service is appropriate. Faisal acknowledges  
16 receiving the summons and TAC, which is consistent with the “summons returned executed”  
17 document. See Doc. No. 104. Faisal contends that he was somehow improperly served, but does  
18 not provide any further explanation. That is, Faisal’s motion does not specifically point out a  
19 material defect that shows service was improper and that would warrant quashing service. See  
20 O’Brien, 998 F.2d at 1400; Photolab, 806 F.2d at 810. Because Faisal’s motion is too vague, it  
21 does not adequately challenge compliance and shift the burden to Gilbert. See Koulkina, 559  
22 F.Supp.2d at 312. Therefore, Faisal’s motion will be denied.

23 3. Kumar

24 Neither dismissing the TAC nor quashing service is appropriate. First, Kumar’s motion is  
25 unclear and does not specifically point out a material defect that would warrant quashing service.  
26 See O’Brien, 998 F.2d at 1400; Photolab, 806 F.2d at 810. Therefore, Kumar has not adequately  
27 challenged the sufficiency of service of process. See Koulkina, 559 F.Supp.2d at 312.

28 Second, Kumar appears to argue in part that service was ineffective because she did not

1 actually receive the summons or the TAC. However, Kumar has already appeared in this case by  
 2 filing an answer to the original complaint. See Doc. No. 13. The answer did not indicate that  
 3 service of process was somehow defective. See id. Because Kumar answered the original  
 4 complaint and did not raise any service related infirmities, the Court detects no reason why Kumar  
 5 could not be served with any amended complaint (including the TAC) through Federal Rule of  
 6 Civil Procedure 5. Under Rule 5, an amended complaint generally must be served on every party.  
 7 See Fed. R. Civ. P. 5(a)(1)(B); Campbell v. Bennett, 47 F.4t h 1362, 1365 (11th Cir. 2022); Brait  
 8 Builders Corp. v. Massachusetts, Div. of Capital Asset Mgmt., 644 F.3d 5, 9 (1st Cir. 2011). Rule  
 9 5 provides several methods of service of an amended complaint, including by “mailing it to the  
 10 person’s last known address – in which event service is complete upon mailing.” Fed. R. Civ. P.  
 11 5(b)(2)(C); see also Southern Cal. Darts Ass’n v. Zaffina, 762 F.3d 921, 928 (9th Cir. 2014).  
 12 Kumar does not allege that the TAC was not mailed to her current or last disclosed address, nor  
 13 does she dispute that Gilbert actually mailed the TAC to her. By Rule 5(b)(2)(C)’s plain  
 14 language, service is effective upon filing. Therefore, that Kumar may not have actually received  
 15 the TAC through the mail does not affect the validity of service.<sup>3</sup> See Southern Cal. Darts, 762  
 16 F.3d at 928.

17 For these reasons, Kumar’s Rule 12(b)(5) motion will be denied.

### 18 **ORDER TO SHOW CAUSE**

19 Gilbert is seeking to recover under the Unruh Act for disability related discrimination.  
 20 Recently, the Ninth Circuit has upheld a district court’s invocation of 28 U.S.C. § 1367(c)(4) to  
 21 decline to exercise supplemental jurisdiction over accessibility related Unruh Act claims. See Vo  
 22 v. Choi, 49 F.4t h 1167, 1174 (9th Cir. 2022). Specifically, the additional filing and heightened  
 23 pleading requirements that California has imposed on high frequency litigators of accessibility  
 24 related Unruh Act claims justified the declination of supplemental jurisdiction.<sup>4</sup> See id. at 1172-

25 \_\_\_\_\_  
 26 <sup>3</sup> The fact that Kumar has filed an answer indicates that she has the TAC. Out of an abundance of caution, and  
 because Kumar is proceeding pro se, the Court will order the Clerk to send Kumar a copy of the TAC.

27 <sup>4</sup> The Court notes that Plaintiff in other cases has admitted that he is a “high frequency litigator” who would otherwise  
 28 be required to comply with the heightened filing and pleading requirements if he pursued an Unruh Act claim in state  
 court. See Gilbert v. Bonfare Markets, Inc., 2023 U.S. Dist. LEXIS 20861, \*5-\*6 (E.D. Cal. Feb. 7, 2023).

74; see also Arroyo v. Rosas, 19 F.4th 1202, 1207, 1211-14 (describing the pleading and filing requirements for high frequency litigators of construction-related accessibility claims and finding that the policy considerations embodied by these requirements were “exceptional circumstances” for purposes of 28 U.S.C. § 1367(c)(4)). These additional pleading and filing requirements apply to Gilbert’s claims under the Health & Safety Code as well. See Gilbert v. Singh, 2023 U.S. Dist. LEXIS 36336, \*4-\*5 (E.D. Cal. Feb. 27, 2023). In light of *Vo*, the Court finds that it is appropriate for Plaintiff to show cause in writing why this Court should continue to exercise supplemental jurisdiction over his Unruh Act and Health & Safety Act claims.

**ORDER**

Accordingly, IT IS HEREBY ORDERED that:

1. Defendants Abdulqawi, Faisal, and Kumar’s respective Rule 12(b)(5) motions to dismiss or quash (Doc. Nos. 106, 107, 108) are DENIED;
2. Within seven (7) days of services of this order, Plaintiff shall show cause in writing why this Court should continue to exercise supplemental jurisdiction over his state law claims in light of *Vo* and *Arroyo*;
3. The failure to timely file a response to this order to show cause will be deemed a non-opposition to the Court declining to exercise supplemental jurisdiction over Plaintiff’s state law claims; and
4. The Clerk shall send a copy of the Third Amended Complaint (Doc. No. 98) to Defendant Amar Kumar.

IT IS SO ORDERED.

Dated: April 11, 2023

  
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SENIOR DISTRICT JUDGE